IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO: H-01-3624**
v.	§	**AND CONSOLIDATED CASES**
	§	
ENRON CORPORATION, et al.,	§	
	§	
Defendants.	§	

CERTAIN DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

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TO THE HONORABLE COURT:

The Undersigned Defendants[1] (hereinafter referred to as "Defendants") file and serve their Response in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order and, in support thereof, respectfully show the Court as follows:

I. INTRODUCTION

Before merits discovery has commenced in this action and before a single document has been produced by Defendants, Plaintiffs petition this Court to enter an order precluding the Defendants from producing any documents pursuant to a confidentiality order and from redacting sensitive personal and financial information from the documents that are produced.[2] In the proposed Order Regarding Confidentiality attached to Plaintiffs' Motion, Plaintiffs request that the personal information of putative class members and third parties -- such as Social Security numbers, driver's license numbers, telephone numbers, addresses, account information, individual portfolio statements, and individual account statements -- should be protected, but they ask this Court to deny that same protection to Defendants without giving a single valid reason why such information should be in the public domain.

Plaintiffs base their request on the public's alleged "common law and constitutional right" to access to the "entire record" in this case, and argue that such "overwhelming First Amendment interests" cannot be abridged absent an "important or substantial government interest." But as

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[1] This Response is joined by Kenneth L. Lay, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Kevin P. Hannon, Joseph M. Hirko, Stanley C. Horton, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Jeffrey K. Skilling, James V. Derrick, Lou L. Pai, John A. Urquhart, Rebecca Mark-Jusbasche, and Ken L. Harrison.

[2] Plaintiffs also apparently seek an order regarding the filing with the Court of documents that are produced pursuant to a protective order, but it is certainly premature to discuss the filing of such documents when no such order has yet been entered, no documents have been designated confidential under such an order, and no one is proposing filing any such designated documents. The protective order imposed by the Court should, therefore, establish a mechanism for dealing with any confidential documents that are ultimately filed.

declared plainly in the very cases relied on by Plaintiffs, a presumptive right to public access simply does not attach to the discovery documents here.

Almost 20 years ago in *Seattle Times*, the United States Supreme Court rejected the very same arguments Plaintiffs make here and held unequivocally that a litigant "has no First Amendment right of access to information made available only for the purposes of trying his suit." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 38 (1984). Accordingly, the courts have broad discretion to fashion protective orders restricting assess to and use of documents produced in discovery based only on a showing of "good cause."

Defendants have not yet been required to produce any documents in this case, so it is impossible to define precisely what information in what documents will be worthy of protection, but it is clear there is good cause to impose a mechanism for the designation of certain documents as confidential and not subject to general dissemination. Plaintiffs have indicated they intend to seek a broad range of personal and financial information from Defendants, including but not limited to: their personal diaries, calendars, appointment books, address books and telephone records; the name and account number of any off-shore accounts of Defendants, their current and former spouses, and minor children; as well as all check registers, check books, and cancelled checks from such accounts; and even their personal income tax returns for the past four years. See, Lead Plaintiff's First Request for Production of Documents From Kenneth L. Lay et al., attached hereto as Exhibit A. There is no question that public dissemination of this information would infringe on the Defendants' privacy and subject them to further annoyance, embarrassment, and oppression. That Plaintiffs and others have "already sullied" Defendants' reputations before there has been any finding on the merits of Plaintiffs' claims (Plaintiffs' Motion, p. 12) should not serve as a reason to allow Plaintiffs to publish deeply personal and financial information about the Defendants.

Accordingly, Defendants propose that Plaintiffs' Motion be denied in all respects and that the Court enter an appropriate protective order[3] in order to facilitate discovery and protect the parties from undue annoyance, embarrassment, and oppression.

II. ARGUMENT AND AUTHORITIES

A. The Presumptive Right of Access Relied On By Plaintiffs Applies Only to "Judicial Proceedings and Records."

Plaintiffs' entire argument rests on the premise that the discovery that will be exchanged in this proceeding is subject to a presumptive right of access of constitutional proportions. But the very cases they rely on -- including a United States Supreme Court case directly on point -- demonstrate that such a presumptive right does not apply to the "raw fruits of discovery."

Plaintiffs cite *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) for the proposition that there exists "a common law public right of access to judicial proceedings and records." (Plaintiffs' Motion, p. 8) Plaintiffs' statement is true enough, but the *Cendant Corp.* case went on to acknowledge -- as Plaintiffs do not -- that "[w]hether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record.'" *Id.* at 192. Likewise, the court in *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157 (3d Cir. 1993), also cited by Plaintiffs, not only recognized that the right of access applies only to judicial records, but also emphasized that pre-trial discovery products "are not public components of a civil trial," are

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[3] The undersigned Defendants have attached as Exhibit B an example of the type of protective order they believe would be appropriate in these proceedings. Defendant Ken L. Harrison, although joining in the rest of this Response, does not join in the other Defendants' approval of Exhibit B as an appropriate form of protective order. All of the undersigned Defendants are, of course, willing to work with each other and the other defendants to submit an agreed-upon order to the Court for approval and entry.

not "open to the public," and "are conducted in private as a matter of modern practice." *Id.* at 164 (citing *Seattle Times*, 467 U.S. at 33).[4]

B. Documents Exchanged During Discovery Are Not "Judicial Proceedings and Records" and Are Not Subject To a Common Law or Constitutional Right of Access.

The circuits are split on what is required to transform a document into a "judicial record," but it is clear that documents merely exchanged in discovery do not qualify. Some courts have held that the status of a document as a "judicial record," subject to the presumptive right of public access, turns simply on whether the document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings. *In re Cendant Corp.*, 260 F.3d at 192. Many courts have concluded that it is the filing of a document that gives rise to a presumptive right of public access. *Leucadia*, 998 F.2d at 161-62 (citing cases). Other courts have taken a more restrictive view of "judicial records" and held that "mere filing of a document with a court does not render the document judicial." *In re Policy Management Systems Corp.*, 67 F.3d 296, 1995 WL 541623, **4 (4th Cir. Sept. 13, 1995). Those courts have concluded that a document "must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach." *Id.*; *see also, Leucadia*, 998 F.2d at 165 (holding that right to public access does not attach to documents filed in connection with discovery motions); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (same).

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[4] Plaintiffs also assert that the Supreme Court in *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982) held "that right of access to court records arises under both the common law and the First Amendment to the United States Constitution." (Plaintiffs' Motion, p. 8) But *Globe Newspaper* did not involve court records at all, but rather access to a criminal trial.

None of the cases cited by Plaintiffs, however, hold that documents produced in discovery constitute "judicial records"[5] -- to the contrary, many cases hold just the opposite. For example, on page 9 of their brief, Plaintiffs quote *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) at length in support of their argument that the "public's right of access to court proceedings and documents is well-established." But Plaintiffs stop their recitation of the court's decision before the court states unequivocally that the "right of access does not extend to information gathered through discovery that is not a part of the public record." *Id.* at 898. Plaintiffs similarly quote from the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), but fail to mention the Court's ultimate conclusion that discovery documents are not public components of a civil trial and are, therefore, not subject to a public right of access. *Id.* at 33.

The Supreme Court in *Seattle Times* expressly rejected the claim made here by Plaintiffs that a pretrial protective order is a restriction on the First Amendment rights to free speech that can only be justified by an "important or substantial government interest." (Plaintiffs' Motion, pp. 14-15, n. 21) The Court acknowledged that -- as in this case -- there certainly was "a public interest in knowing more about respondents" and that such interest "may well include most -- and possibly all -- of what has been discovered" through the discovery process. *Seattle Times*, 467 U.S. at 31. Nevertheless, the Court held that it "does not necessarily follow . . . that a litigant has an unrestrained

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[5] Plaintiffs rely on: *In re Cendant Corp.*, 260 F.3d at 192 (dealing with sealed bids for lead plaintiffs' counsel filed with the court); *Leucadia, Inc.*, 998 F.2d at 161 (dealing with documents attached to pre-trial motions filed with the court); *Globe Newspaper Co.*, 457 U.S. at 603 (dealing with access to a criminal trial); *United States v Hubbard*, 650 F.2d 293, 315 (D.C.Cir. 1980) (dealing with documents filed under seal with the court); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (dealing with documents on file with the court); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (dealing with audio tapes admitted into evidence and played for the jury); *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) (dealing with the court's sealing of an injunction order); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (dealing with a settlement agreement filed under seal); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (dealing with a pre-sentencing report filed under seal); and *In re Papst Licensing, GmbH, Patent Litig*, MDL 1298, 2001 U.S. Dist. LEXIS 15183, at *7 (E.D. La. Sept. 17, 2001) (dealing with documents filed with the court).

right to disseminate information that has been obtained through pretrial discovery." *Id.* The discovery process itself is a "matter of legislative grace" and, therefore, a litigant simply has "no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* at 32.[6]

C. Federal Rule of Civil Procedure 23 and The Fact That Plaintiffs Purport To Represent A Class Do Not Preclude the Entry of a Protective Order.

Plaintiffs seem to concede in footnote 15 of their Motion that documents produced in discovery are not generally considered "judicial records" by arguing that discovery documents should nevertheless be considered "judicial records" in this particular case because: "[t]o the degree that this Court must rely on the parties' representations throughout this litigation in acting, or not acting, to benefit absent members of the [purported] class, the documents produced in discovery ought to be considered part of the judicial record and the public afforded access pursuant to their common law right." (Plaintiffs' Motion, page 9 n.15) But, in making their argument, Plaintiffs misinterpret and misapply *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987). Even setting aside the obvious point that the Court has not certified a class, Plaintiffs' analysis of *In re Agent Orange* omits several critical facts.

Plaintiffs assert that the court in *In re Agent Orange* concluded that the "class members should be given access to discovery material so that they may understand why their class representatives urged the Court to approve the settlement." Inherent in that statement, but otherwise ignored in

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[6] Even if the documents exchanged during the discovery process were considered "judicial records," which they clearly are not, the common law right to public access of judicial records is not absolute. *In re Cendant Corp.*, 260 F.3d at 194; *Leucadia*, 998 F.2d at 165. The presumption of public access may be rebutted. *In re Cendant Corp.*, 260 F.3d at 194. Every court has supervisory power over its own records and files, and access even to court files has been denied where such files might have become a vehicle for improper purposes. *Id.* Courts will restrict access to public records where: (1) the material is the kind of information that courts will protect; and (2) disclosure will work a clearly defined and serious injury to the party seeking disclosure. *Id.* Therefore, Defendants may produce documents that are of a sufficiently sensitive nature to justify continued protection even if they are ultimately filed with the Court.

Plaintiffs' discussion, is the fact that the district court had during the course of the litigation, issued several protective orders to protect the documents produced in discovery. In 1981, the judge initially supervising the litigation issued a protective order allowing defendants to designate as "confidential" those records which they contended contained "confidential developmental, business, research or commercial information." *Id.* at 563. In May 1982, the special master then supervising discovery approved a much broader protective order requiring that "all documents produced by any party and all depositions were to be treated confidentially." *Id.* In 1984, after the court had tentatively approved a settlement, the Vietnam Veterans of America, on behalf of several members of the plaintiff class, made a request for public access to the discovery material. The court, in reviewing the VVA's request, noted that arguably "all of the documents reviewed by the attorneys were relied on by the Court in approving the settlement" and held that "[o]nce a court has relied on material, that material should be disclosed" absent good cause. *Id.* at 573 and n. 13.

The court then concluded that the reasons underlying the initial grant of the protective orders no longer constituted "good cause" to keep the protective orders in place once the litigation was complete and much of the material subject to the protective orders "may now be 20 to 30 years old." *Id.* at 570, 575. Consequently, the court lifted the previous protective orders. Nevertheless, contrary to Plaintiffs' suggestion in footnote 15, the court *still* did not provide the VVA with unfettered access to the discovery documents. The court merely lifted the broad protective orders that had been in place throughout the litigation and required the defendants to "designate any particular documents or category of documents as confidential" if they still wished to do so. *Id.* at 574, 575.

Accordingly, the Second Circuit has held that *Agent Orange* did not establish "a new rule that created 'a presumption that discovery materials should be publicly available whenever possible . . .'" *SEC v. TheStreet.com*, 273 F.3d 222, 231 n.9 (2d Cir. 2001). The Second Circuit therefore expressly

disapproved of the contrary holding in *Westchester Radiological Ass'n P.C. v. Blue Cross/ Blue Shield of Greater New York, Inc.*, 138 F.R.D. 33, 36 (S.D.N.Y. 1991), cited by Plaintiffs on page 11 of their Motion. *Id.*[7]

Plaintiffs also cite *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) in support of their argument that entering a protective order in this case would be an impermissible restraint on Plaintiffs' and their counsel's ability to communicate with members of the proposed class and, therefore, would be inconsistent with Rule 23. (Plaintiffs' Motion, pp. 12-13) But the protective order at issue in *Gulf Oil* was very different, as it prohibited "*all communications* concerning the case from parties or their counsel to potential or actual class members." *Id.* at 93 (emphasis added). The Supreme Court found that such an order interfered with plaintiffs' counsel's ability to inform potential class members of the very existence of the lawsuit and made it difficult for them to gather information about the merits of the case from the persons they sought to represent, and also found that the lower court had not set forth a sufficient factual record to demonstrate such a restraint was necessary. *Id.* at 100-101, 103. Contrary to Plaintiffs' suggestion that "the holding of *Gulf Oil* is broad" (Plaintiffs' Motion, p. 13), the Court specifically limited its decision "to the situation before [it] -- involving a broad restraint on communication with class members." *Id.* at 104 n. 21. Consequently, the Court's holding in *Gulf Oil* has no relevance here.

Similarly, the court in *Williams v. Chartwell Financial Services, Ltd.*, 204 F.3d 748 (7th Cir. 2000), also cited by Plaintiffs, also focused on an order prohibiting the plaintiffs from *contacting* members of the putative class. *Id.* at 759 (noting that "plaintiffs have a right to contact members of

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[7] *TheStreet.com* also recognized that the *Agent Orange* line of cases was based in large part on FED. R. CIV. PROC. 5(d), which has since been amended to prohibit the filing of certain discovery materials. "[W]e observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them." *Id.* at 233 n. 11.

the putative class"). Although the order at issue also dealt with the dissemination of confidential documents, the court did not in any way analyze that portion of the order. But the court acknowledged:

> The decision to grant a protective order is a discretionary one to be used by courts to control the course of class action litigation. The discretion to issue such orders has been vested with trial courts because it is well-recognized that class actions present opportunities for abuse . . . . Because of the potential for abuse, a district court has *both the duty and the broad authority* to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

Id. at 759 (emphasis added). Accordingly, the court did not hold that the protective order at issue was inappropriate; it merely remanded to provide the trial court the opportunity to make specific findings to assure the court that it had adequately balanced the potential for abuse with the right of the plaintiffs to contact potential class members. *Id.*

The final case cited by Plaintiffs in this section, *Zenith Radio Corp. v. Matsushita Electric Indus. Co., Ltd.*, 529 F.Supp. 866, 892 (E.D. Pa. 1981), *approved* an umbrella protective order and *denied* plaintiffs' motion for wholesale declassification of the documents that had been designated as confidential. *Id.* at 914-915.

D. A Restriction on the Use of Documents Obtained Through Discovery Would Not Unduly Burden Plaintiffs' Right To Free Speech.

Plaintiffs argue on pages 14 - 18 of their Motion that their "constitutional right of free speech . . . would be unduly burdened by the issuance of a protective order," relying on *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) and *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000). Both of these cases are inapposite because they both involve broad restrictions on speech, not the use of documents obtained in discovery. *Gulf Oil* concerned an order prohibiting all communications concerning the case, and the order at issue in *Brown* prohibited the parties, lawyers, and potential witnesses from making "any extrajudicial statement or interview" about the trial that "could interfere

with a fair trial or prejudice any defendant, the government, or the administration of justice." *Gulf Oil*, 619 F.2d at 465; *Brown*, 218 F.3d at 418.

The Supreme Court held in *Seattle Times* that protective orders restricting the use of discovery documents "implicate the First Amendment rights of the restricted party to a far lesser extent" than would this type of restraint. *Seattle Times*, 467 U.S. at 34. Plaintiffs quote *Seattle Times* in an effort to suggest that before entering a protective order, the court must in each instance consider whether the order "[furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." (Plaintiffs' Motion, pp. 14-15) But Plaintiffs misinterpret *Seattle Times*. The Court itself undertook the above-described balancing test in determining the constitutionality of protective orders in general and held that the "prevention of the abuse that can attend the coerced production of information under a State's discovery rule *is sufficient justification* for the authorization of protective orders." *Id.* at 35-36. Thus, the Court held that a protective order restricting the use of documents exchanged in discovery "does not offend the First Amendment." *Id.* at 37. Accordingly, Plaintiffs' entire First Amendment argument is misplaced and without merit.

E. Entry of a Protective Order Is Appropriate and Necessary To Prevent Abuse.

In light of the broad and intrusive discovery already requested by Plaintiffs and the potential that personal and financial information gained through such discovery will end up in the public domain in the absence of any restrictions imposed by this Court, a protective order is appropriate and necessary. Plaintiffs cite *Zenith Radio* in support of their argument that the Court should not permit documents to be produced pursuant to a protective order in this case (Plaintiffs' Motion, p. 14), but

Zenith Radio actually extolled the benefits and necessity of such protective orders, especially in complex cases such as this one. The court noted:

> The propriety and desirability of protective orders securing the confidentiality of documents containing sensitive commercial information that are the subject of discovery in complex cases is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order similar to [the one at issue here] has not been agreed to by the parties and approved by the court.

Zenith Radio, 529 F. Supp. at 889. Indeed, trial courts have substantial latitude to fashion protective orders upon a showing of "good cause." *Seattle Times*, 467 U.S. at 36. Even the cases cited by Plaintiffs for the general proposition that the fruits of discovery normally should be open to the public[8] recognize that in many instances protective orders are necessary "to protect parties from harm that may result from unfettered exposure of discovered information." *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F.Supp. 393, 403 (W.D.Vir. 1987); *see also, Citizens First National Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999).

The overriding purpose of a protective order is to facilitate the communication of information *between litigants*. *Zenith Radio*, 529 F.Supp. at 911-12. To accomplish that end, it is often necessary to limit the dissemination of that information outside the court. *Id.* Several general governmental interests support the imposition and enforcement of such orders. *Id.* For example,

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[8] Plaintiffs primarily rely on *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) and *In re Halkin*, 598 F.2d 176, 188 (D.C.Cir. 1979) in support of this argument, but those cases were decided prior to the Supreme Court's decision in *Seattle Times*, in which it held that the discovery process is generally "conducted in private." As recognized in *Tavoulareas v. Washington Post Company*, 111 F.R.D. 653, 655 (D.D.C. 1986), *In re Halkin* was overruled by *Seattle Times*. Moreover, the court in *Wilk* did not suggest that an umbrella protective order was in any way inappropriate; it merely modified the protective order so that the State of New York, a litigant in a related case, could have access to the same information it would have been entitled to in discovery. *Wilk*, 635 F.2d at 1301. Notably, the "State did not seek to dissolve the protective order entirely; rather, it sought access to the protected materials on the same terms as the *Wilk* plaintiffs." *Id.* at 1297. Likewise, the court in *Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 U.S. Dist. LEXIS 1651 (N.D. Tex. Feb. 1, 2002), also cited by Plaintiffs, merely modified the protective order that was in place to allow information to be shared with plaintiffs in related litigation, "so long as the plaintiffs in each such case agree to a protective order" similar to the one already in place.

courts have recognized that the invasive nature of the discovery process often constitutes good cause for the entry of a protective order. As the Court well knows, the scope of discovery is far broader than those matters that will ultimately be relevant and admissible at trial. FED. R. CIV. PROC. 26(b). Because much of the information that surfaces during pretrial discovery may be unrelated or only tangentially related to the underlying cause of action, the Supreme Court has recognized that restraints on the use of the information generated through discovery are often appropriate and necessary. *Seattle Times,* 467 U.S. at 33 - 34.

The liberal nature of the discovery rules creates a "significant potential for abuse." *Id.* at 34. "This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Id.* at 35. Under the laws of procedure, parties and related persons often have no choice but to divulge information they would not otherwise freely share. *Word of Faith World Outreach Center Church, Inc. v. Morales*, 143 F.R.D. 109, 113 (W.D. Tex. 1992). To allow a party to use that information for purposes unrelated to the litigation and in a manner that harms the giver of that information is abusive. *Id.* "The government clearly has a substantial interest in preventing this sort of abuse of its processes." *Seattle Times*, 467 U.S. at 35; *Word of Faith*, 143 F.R.D. at 113.

In this case, the discovery requests already propounded by Plaintiffs demonstrate the broad range of personal and financial information Plaintiffs are seeking from the Defendants, including but not limited to: their personal diaries, calendars, appointment books, address books and telephone records; the name and account number of any off-shore accounts of Defendants, their current and former spouses, and minor children; as well as all check registers, check books, and cancelled checks from such accounts; and even their personal income tax returns for the past four years. See, Lead Plaintiff's First Request for Production of Documents From Kenneth L. Lay et al., attached hereto

as Exhibit A. This Court has already noted that Plaintiffs' prior discovery requests were "extraordinarily broad and intrusive." September 17, 2002 Memorandum and Order.

The documents sought by Plaintiffs undoubtedly will contain the kind of material that this Court and others have demonstrated an intent to protect. For example, courts consider income tax returns to be "highly sensitive," and are reluctant to order their routine disclosure. *Natural Gas Pipeline Company of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993). "Not only are the taxpayer's privacy concerns at stake, but unanticipated disclosure also threatens the effective administration of our federal tax laws given the self-reporting, self-assessing character of the income tax system." *Id.* For that reason, "[p]ublic policy favors the nondisclosure of income tax returns." *DeMasi v. Weiss*, 669 F.2d 114, 119, 121 (3d Cir. 1982) (noting that "petitioners' privacy claims are not frivolous but serious"). Likewise, courts have given protection to the privacy of individuals' social security numbers, addresses, and telephone numbers. *See, e.g., Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 622 (S.D. Ind. 2002) (allowing redaction of social security numbers); *Walters v. Breaux*, 200 F.R.D. 271, 274 (W.D. La. 2001) (allowing redaction of medical information, social security numbers, home addresses, and home telephone numbers).

The Southern District of Texas has recognized that individuals have a privacy interest in this type of information and has issued General Order No. 2002-9 in an effort to protect personal privacy and some of the same types of information that Defendants seek to protect here, such as social security numbers and financial account numbers. Amazingly, Plaintiffs seek to *broaden* this protection for themselves and other putative class members, but ask this Court to deny that same protection to Defendants. Such a violation of Defendants' privacy simply is unwarranted.

The Supreme Court in *Seattle Times* specifically approved a protective order that restricted the use of documents concerning the financial affairs of the various plaintiffs. 467 U.S. at 27. The

Court agreed with the lower court's finding that "[t]he information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression." *Id.* at 28.

The potential for the abuse of personal and financial information about the Defendants is especially great in a case like this one that already has garnered so much media attention. Courts have routinely restricted access to documents that might be used to "gratify spite or promote scandal, and files that might 'serve as reservoirs of libelous statements for press consumption.'" *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 598 (1978)); *Zenith Radio*, 529 F.Supp. at 901. Restricted access is necessary in such cases to "minimize the danger of an unfair trial by adverse publicity." *Amodeo*, 44 F.3d at 147; *Anderson*, 805 F.2d at 8 (holding good cause existed for imposition of protective order because of concern that "extensive publicity generated by the allegations made against the defendants, particularly the accounts appearing in the daily newspapers, would inhibit and perhaps prevent the selection of an impartial jury"); *In re Alexander Grant & Co.*, 820 F.2d 352 (11th Cir. 1987) (holding the "fear of adverse publicity, intimidation or other outside forces that could interfere with the free flow of information, most of which would not be admissible during the actual litigation stage of [the] cases" constituted good cause for issuance of a broad protective order). While Plaintiffs piously disclaim a desire to try their case in the press, it is obvious that Plaintiffs' counsel has from the beginning sought to prejudice potential jurors against Defendants through the media.[9]

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[9] In the scores of press articles Plaintiffs' counsel has reviewed, quoted, and attached to various pleadings, they were able to find one article in which Milberg Weiss declined to "debate the case in the press." Based on that find, Plaintiffs contend that they and their counsel have "exercised considerable restraint" when it comes to speaking with the media. The articles attached hereto as Exhibits C - O, however, demonstrate that Plaintiffs' counsel (continued...)

In addition, the Court's need to manage successfully large and complex cases also can provide good cause for entry of a protective order. *Zenith Radio*, 529 F.Supp. at 912. In *In re Agent Orange,* cited by Plaintiffs, the district court justified a blanket protective order covering all documents produced by either party, stating that good cause existed for such an order because of the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the [scheduled] trial date." *In re Agent Orange,* 104 F.R.D. at 563; *see also, In re Alexander Grant & Co.*, 820 F.2d at 356 (recognizing that protective orders expedite the flow of discovery material, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material deemed worthy of protection).

In balancing these well-recognized benefits of protective orders against the litigants' desire to publicize information, it is "worth emphasizing" that "even when a protective order is entered, litigants have access to discovery materials for all the purposes for which they are legitimately acquired through court processes." *Zenith Radio*, 529 F.Supp. at 912. As noted in *Word of Faith*, because nothing in such a protective order would prevent the facts in produced documents from being used, if and as necessary, in the trial of this action, Plaintiffs will not suffer any harm from the entry of a protective order "except, perhaps by depriving [Plaintiffs' counsel] of another television appearance." *Word of Faith*, 143 F.R.D. at 113.

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[9] (...continued)
have not always been so reticent, including an article from the September 9, 2002 edition of The New Yorker detailing a "cross-country marathon" in Bill Lerach's private jet during which he "talked for hours" about his view of this case. (Exhibit C)

F. The Size and Complexity of This Case Require The Imposition of a Broad Protective Order.

Because of the size and complexity of this case, and the volume of documents that undoubtedly will be produced, there is good cause for entry of a broad protective order that would allow Defendants to designate what they believe in good faith to be confidential documents -- including documents containing Social Security numbers, dates of birth, driver's license numbers, addresses, telephone numbers, salary information, income, investments (such as individual portfolio statements), and/or bank account information -- subject to a challenge by Plaintiffs on a document-by-document basis. In short, Defendants seek the same protection -- and the same procedure for designating confidential documents -- that Plaintiffs seek for themselves.

It would be unrealistic and unworkable to require Defendants to submit each confidential document to the Court for review and to make a separate showing of "good cause" as to each individual document as Plaintiffs suggest.[10] (Plaintiffs' Motion, p. 18) Determinations of good cause need not be made on a document-by-document basis. *Citizens First Nat'l Bank*, 178 F.3d at 946. In complicated cases where document-by-document review of discovery materials would be unfeasible, an "umbrella"[11] protective order should be used to protect documents designated in good faith by the producing party as confidential. *In re Alexander Grant & Co.*, 820 F.2d at 356.

The court in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994), cited by Plaintiffs, acknowledged:

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[10] Plaintiffs claim that Defendants cannot meet the burden of demonstrating a "clearly defined and serious injury" as to "each and every document sought to be covered." But Plaintiffs do not explain how they can possibly make such a bold statement when they have no idea what documents, if any, Defendants will seek to protect.

[11] Courts have not been consistent in the terms used to describe various types of protective orders. The term "umbrella" order sometimes is used to refer to orders that deem all documents produced to be confidential and, other times, to refer to orders that allow the parties to designate documents as confidential subject to challenge by the other party.

> [B]ecause of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad umbrella protective order upon a threshold showing by the movant of good cause. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.

Id. at 787 n. 17 (internal cites omitted); *see also, Leucadia*, 998 F.2d at 166 (approving similar process). The court in *Zenith Radio* also approved a protective order that appears to be very similar to the one proposed by Defendants. PTO 35 provided that confidential information -- defined as any information that is designated "confidential" at the time of its disclosure -- could be used only in the preparation for trial and/or trial of the lawsuit and not for any other purpose whatsoever. *Zenith Radio*, 529 F.Supp. at 875. Any party objecting to a "confidential" designation of information was required to follow prescribed procedures in order to challenge that designation. *Id.* That is precisely the procedure set forth in the sample Confidentiality and Protective Order attached as Exhibit B.

Plaintiffs quote at length from *Holland v. Summit Autonomous, Inc.*, No. 00-2313, 2001 U.S. Dist. LEXIS 12659, at *2 (E.D. La. Aug. 14, 2001) and *Bayer AG and Miles, Inc. v. Barr Laboratories, Inc.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995) for the proposition that "umbrella" protective orders are "disfavored." (Plaintiffs' Motion, p. 18) The type of order the courts refer to there as "umbrella," however, deem all discovery as protected without any designation by the parties or the court. *Holland* and *Bayer* describe orders that permit the parties to designate and protect documents they in good faith believe are confidential as "blanket" protective orders. Although Plaintiffs end their quotation of the *Holland* and *Bayer* opinions with ellipses, the courts both go on to state that "blanket" protective orders -- such as that sought by the undersigned Defendants -- "are essential to the functioning of civil discovery." *Holland*, 2001 U.S. Dist. LEXIS 12659 at *2; *Bayer AG*, 162 F.R.D. at 465.

III. CONCLUSION

Because Defendants have demonstrated "good cause" for entry of a protective order, and because Plaintiffs have avowed that they will not agree to one, no matter how narrow (Plaintiffs' Motion, pp. 18-19), the Court should enter a Confidentiality and Protective Order similar to the sample order attached as Exhibit B.

WHEREFORE, the undersigned Defendants respectfully request that this Court deny Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order; enter a Confidentiality and Protective Order similar to the one attached as Exhibit B; and grant Defendants such other and further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Court's Orders of June 6, 2002 and August 7, 2002, the foregoing document was served electronically to counsel of record on October 15, 2002.

/s/ Kelli Hinson

The Exhibit(s) May

Be Viewed in the

Office of the Clerk